83-189

No.————

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

———

JAMES LEWALLEN, LESLIE COOPER, ALBERT WRIGHT,

Petitioners,

VS.

COMMONWEALTH OF KENTUCKY

Respondent.

———

PETITION FOR WRIT OF CERTIORARI TO THE CAMPBELL COUNTY CIRCUIT COURT, 17TH JUDICIAL DISTRICT OF THE COMMONWEALTH OF KENTUCKY

———

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QUESTION PRESENTED FOR REVIEW

I. DOES THE DECISION IN *CARTER* v. *KENTUCKY*, 450 U.S. 288 (1981) APPLY TO A JUDGMENT AND CONVICTION WHICH WAS ENTERED AFTER ITS EFFECTIVE DATE, BUT WHICH WAS BASED UPON A JURY VERDICT RETURNED PRIOR TO ITS ANNOUNCEMENT BY THE SUPREME COURT?

PARTIES TO THE PROCEEDINGS

IN THE CAMPBELL COUNTY DISTRICT COURT,
COMMONWEALTH OF KENTUCKY

PLAINTIFF: THE COMMONWEALTH OF KENTUCKY

DEFENDANTS: JAMES LEWALLEN;
LESLIE COOPER;
ALBERT WRIGHT;
MARY DEL WRIGHT.

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APPENDIX:

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Judgment and Sentence of the Campbell County, District Court in Case Nos. 80-M-762; 80-M-764; 80-M-709; and 80-M-763 entered on March 16, 1981.

Exhibit B 2a
Judgment of the Campbell County Circuit Court in Cases Nos. 81-X-15; 81-X-16; and 81-X-17, filed on November 4, 1982.

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Order Denying Discretionary Review in the Kentucky Court of Appeals, Case No. 82-CA-2554-I, entered January 31, 1983.

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Order Denying Discretionary Review in the Supreme Court of Kentucky, Case No. 83-SC-127-D, entered on June 8, 1983.

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Defendants' Requested Jury Instruction No. 29, filed in Campbell District Court, Cases No. 80-M-762; 80-M-764; 80-M-709; 80-M-763.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No.--------

JAMES LEWALLEN, LESLIE COOPER, ALBERT WRIGHT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CAMPBELL COUNTY CIRCUIT COURT, 17TH JUDICIAL DISTRICT OF THE COMMONWEALTH OF KENTUCKY

The petitioners, James Lewallen, Leslie Cooper and Albert Wright, by counsel, pray that a Writ of Certiorari issue to review the judgment and order of the Campbell Circuit Court entered in this case on November 4, 1982.

OPINIONS BELOW

No written opinion regarding the issue in this case was filed or published by the Campbell District Court and no written transcript has been prepared from the oral record-

ing of the proceedings. The written Findings of Fact, Conclusions of Law and Judgment of the Campbell Circuit Court is at Pages 2a-13a of the Appendix and has not been officially reported.

JURISDICTIONAL STATEMENT

The Judgment of the Campbell Circuit Court 17th Judicial District of the Commonwealth of Kentucky was entered on November 4, 1982 (App. B). The Court of Appeals of Kentucky denied discretionary review on January 31, 1983 (App. C). The Supreme Court of Kentucky denied discretionary review on June 8, 1983 (App. D).

Jurisdiction of this Court is invoked under *28 USC § 1257 (3)*.

CONSTITUTIONAL PROVISIONS

AMENDMENT 5, CONSTITUTION OF UNITED STATES:

> Nor shall [any person] be compelled in any criminal case to be a witness against himself.

AMENDMENT 14, CONSTITUTION OF THE UNITED STATES:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Petitioners, James Lewallen and Leslie Cooper, were cited to the District Court of Campbell County, Kentucky, for "Distribution of obscene matter" under *KRS. 531.010.* Petitioner, Albert Wright and Mary Del Wright, his wife, were cited for "Facilitation of distribution of obscene matter" under *KRS. 506.080* The charges arose out of the purchase of three adult magazines at the Monmouth Street Theatre and Variety Shop, an adult bookstore in Newport, Kentucky, on April 9, 1980.

Leslie Cooper made the sale and was the only defendant actually present. James Lewallen held the bookstore's occupational licenses in conformity with local zoning ordinances for location of adult businesses and had previously filed local tax forms as its "owner." James Lewallen had been observed working there on prior occasions when police had routinely checked the premises. He had leased the premises from Mary Del Wright in 1976.

In 1979, Albert Wright became co-owner of title to the real estate. In November of 1979, he asked the City Manager of Newport to transfer the bookstore's occupational licenses away from James Lewallen. Some months before the sale, he had been seen frequenting the premises, talking on the phone, watching TV and going into the cash drawer, but not working or waiting on customers. Mary Del Wright was co-owner of title to the real estate and its lessor; utility service was provided in her name.

The case was tried to a jury. Leslie Cooper was the only defendant to testify. All four defendants requested, in writing, the following instruction:

> The law does not compel a defendant in a criminal case to take the witness stand and testify, and no

> presumption of guilt may be raised and no inference of any kind may be drawn, from the failure of a defendant to testify. (App. E)

The Commonwealth did not object to this instruction. The trial court, without explanation, refused to give any "no inference" instruction.

Mary Del Wright was acquitted. The three petitioners were convicted. The jury sentenced James Lewallen to 365 days in jail and fined him $500.00. The jury fined Leslie Cooper $500.00. The jury sentenced Albert Wright to 90 days in jail and fined him $250.00. The jury verdict was returned on February 26, 1981. The decision in *Carter* v. *Kentucky*, 450 U.S. 288, was announced on March 9, 1981. Final judgment and sentence of the Campbell District Court was not entered until March 16, 1981 (App. A).

The convictions were appealed to the Campbell Circuit Court on the grounds, *inter alia*, that the failure to give a "no inference" instruction violated the petitioners' rights under the Fifth Amendment to the United States Constitution under *Carter* v. *Kentucky*. On November 4, 1982, the Campbell Circuit Court ruled that the decision in *Carter* v. *Kentucky* was "not retroactive" and that the District Court's failure to give a "no inference" instruction was not error (App. B).

On January 31, 1983, the Kentucky Court of Appeals denied discretionary review (App. C). On June 8, 1983, the Supreme Court of Kentucky denied discretionary review (App. D).

REASONS TO ALLOW WRIT OF CERTIORARI

The Court should grant certiorari because the Kentucky Circuit Court has decided the federal question of "retroactive" application of *Carter* v. *Kentucky* in a way that is in conflict with the decisions of this Court in *Mack* v. *Oklahoma,* 103 S.Ct. 201 (1982); *United States* v. *Johnson,* 102 S.Ct. 2579 (1982); *O'Connor* v. *Ohio,* 385 U.S. 92 (1966); and *Tehan* v. *United States,* 382 U.S. 406 (1966).

In *Carter* v. *Kentucky,* 450 U.S. 288 (1981), this Court held that a Kentucky trial court's refusal to give a requested "no inference" instruction upon a defendant's failure to testify is a violation of the Fifth Amendment privilege against self-incrimination made applicable to the states by the Fourteenth Amendment. The Court did not decide the question of retroactive effect. The majority indicated that the constitutional decision in *Carter* was one that the Court had specifically anticipated and reserved in *Griffin* v. *California,* 380 U.S. 609, 615, n.6 (1965) and *Lakeside* v. *Oregon,* 435 U.S. 333, 337 (1978), and which had been previously decided as a question of federal statutory law by a unanimous court in *Bruno* v. *United States,* 308 U.S. 287 (1939). *Carter* did not overrule any established precedent of the Court.

In *Mack* v. *Oklahoma,* 103 S.Ct. 201 (1982), a memorandum decision, this Court vacated a decision of the Court of Criminal Appeals of Oklahoma which had denied retroactive application of *Carter* v. *Kentucky* to a case which was on direct appeal at the time *Carter* was announced. *Mack* v. *State* 641 P.2d 1122 (Okla.Crim., 1982). The case was remanded to the Oklahoma Court for further consideration in light of *United States* v. *Johnson,* 102 S.Ct. 2579 (1982).

In *Johnson*, this Court held that *Payton* v. *New York*, 445 U.S. 573 (1979), should be applied retroactively to a defendant whose appeal was pending when it was announced. The majority decided as a general proposition, to give such retroactive application to any of its decisions construing the Fourth Amendment. 73 L.Ed.2d at 222 The Court, in deciding *Johnson*, adopted for the first time the reasoning of Justice Harlan in *Desist* v. *United States*, 394 U.S. 244, 256 (1969) (dissenting opinion) and *Mackey* v. *United States*, 401 U.S. 667, 675 (1971) (separate opinion) arguing for a uniform retroactivity rule that would, at a minimum, apply constitutional standards to all defendants whose cases were still pending on direct appeal at the time of a law-changing decision. *United States* v. *Johnson*, 73 L.Ed.2d at 210-213.

In *Tehan* v. *United States*, 382 U.S. 406 (1966) and *O'Connor* v. *Ohio*, 385 U.S. 92 (1966), this Court considered the retroactivity of *Griffin* v. *California*, 380 U.S. 609 (1965), a Fifth Amendment case which was the precedent upon which *Carter* primarily rested. Even though *Griffin* was considered to be a significant departure from previous law, the Court gave it retroactive application to all convictions which were not "final" on the date *Griffin* was rendered; "final" was defined as meaning that all availability of direct appeal had been exhausted and all possibility of certiorari extinguished. *O'Connor* v. *Ohio*, 385 U.S. at 93; *Tehan* v. *United States*, 382 U.S. at 409 (n.3).

The petitioners' cases were still before the trial court at the time *Carter* was announced. The Kentucky court's decision that *Carter* v. *Kentucky* did not apply is in direct contradiction to this Court's established precedents on retroactive application of Fifth Amendment decisions affecting a defendant's substantive rights.

II. THE KENTUCKY COURT'S DECISION IS IN CONFLICT WITH THE REPORTED DECISIONS OF EVERY OTHER STATE COURT RULING ON THE RETROACTIVE APPLICATION OF *CARTER* v. *KENTUCKY*.

One state court of last resort has specifically held *Carter* v. *Kentucky* to be retroactive to cases pending on direct appeal at the time of its announcement. *Franklin* v. *State*, 98 Nev. 266, 646 P.2d 543 (1982). Other states have applied *Carter* to overturn convictions which were on direct appeal without discussion of retroactivity. *People* v. *Crawford*, 632 P.2d 626 (Col., 1981); *Brown* v. *State*, 617 S.W. 2d 234 (Tex.Crim. App. 1981) *Mosley* v. *State*, 402 So.2d 559 (Fla. App. 1981). Another state court has applied *Carter* to a case pending on direct appeal but has found the error to be harmless. *Richardson* v. *State*, 402 So.2d 848 (Miss., 1981). Recently, the Court of Criminal Appeals of Oklahoma reversed its prior decision in *Mack* v. *State*, and retroactively applied *Carter* to reverse a conviction on direct appeal at time of announcement. *Mack* v. *State*, 654 P.2d 1084, (Okla. Crim. 1982) (on remand from U.S. Supreme Court, *Mack* v. *Oklahoma*, 193 S. Ct. 201).

In addition, one Federal District Court has held *Carter* to be retroactive to a trial held one year before its announcement. *Cleveland* v. *Pulley*, 551 F.Supp. 476 (N.D. Cal., 1982).

The Supreme Court of Kentucky has recently held that the failure to give a requested "no inference" instruction can be harmless error. *Commonwealth* v. *McIntosh*, 646 SW2d 43 (Ky., 1983). That reported decision does not address retroactivity nor does it appear to apply it by implication. The decision of the Kentucky Circuit Court

in the petitioners' case is unsupported by any decisional law of Kentucky's higher appellate courts (both of which declined discretionary review) and conflicts with the present decisional law in every other jurisdiction.

CONCLUSION

The decision of the Kentucky Circuit Court in this case regarding the retroactive application of *Carter* v. *Kentucky* is at odds with this Court's decisions in *Mack* v. *Oklahoma, United States* v. *Johnson, O'Connor* v. *Ohio,* and *Tehan* v. *United States,* as well as the decisions of the other state courts of last resort which have addressed the issue. Under the guidelines of *Rule 17,* Rules of the Supreme Court, the determination of the retroactive application of *Carter* is an important issue of federal law that merits review on Writ of Certiorari.

Respectfully Submitted,

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APPENDIX

CALENDAR

Date March 16, 1981
Time 9:00 A.M.

DISTRICT 1 ROOM 2 – KOPOWSKI

Case No.: 80-M-762.
Style: ALBERT WRIGHT, Cont. for Sent.
Charges or Claim: 506.080 Crim. facil. at dist. of Obscene Matter 531.020.
Proceedings: 90 days in jail. $250.00 and C. Appeal bond: 500.00 cash Stay March 27, 1981.

Case No.: 80-M-764.
Style: MARY DEL WRIGHT.
Charges or Claim: 506.080 Crim. facil. at Dist. of obscene matter 521.020.
Proceedings: Not Guilty – Jury Verdict.

Case No.: 80-M-709.
Style: LESLIE COOPER.
Charges or Claim: 531.020 Dist. of obscene matter.
Proceedings: $500.00 and C Appeal Bond: 500.00 cash Stay March 27, 1981.

Case No.: 80-M-763.
Style: JAMES LEWALLEN.
Charges or Claim: 531.020 Dist. of obscene matter.
Proceedings: 365 days in jail. $500.00 and C. Appeal Bond: $700.00 cash. Stay March 27, 1981.

Judge Signature /s/ LEONARD L. KOPOWSKI
Date 3/16/81

CAMPBELL CIRCUIT COURT
DIVISION NO. TWO

No. 81-X-15
No. 81-X-16
No. 81-X-17

COMMONWEALTH OF KENTUCKY

Plaintiff/Appellee,

vs.

JAMES E. LEWALLEN, et al.

Defendant/Appellant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

(Filed November 4, 1982)

FINDINGS OF FACT

This is a consolidated appeal by James Lewallen, Leslie Cooper and Albert Wright, from a judgment of the Campbell County District Court, pursuant to a jury trial finding the appellants guilty of violating K.R.S. 531.020 and fixing their punishment as follows: James Lewallen, 365 days in jail and $500 fine; Leslie Cooper, $500 fine. Albert Wright, 90 days in jail and $250 fine.

CONCLUSIONS OF LAW

1. The first ground for reversal is that the trial court erred in not instructing the jury that it should give no weight to the failure of the defendants, James Lewallen and Albert Wright, to testify. At the time of this trial and verdict, the giving of this offered instruction had not been declared mandatory in Kentucky. The U.S. Supreme Court's decision mandating the giving of such offered instruction is not retroactive, and it is concluded that such failure is not error in this case.

2. Also claimed as error is that the trial judge refused a change of venue. Appellants offered affidavits and testimony concerning pretrial publicity. The Commonwealth offered no evidence, but objected to such change.

The Court conducted an evidentiary hearing after which it exercises its discretion to deny a change. Like all discretionary matters, it is subject to abuse, and if the denial amounts to an abuse, and if such abuse is prejudicial, it is ground for setting aside the result of the trial. However, the record does not disclose that this was an abuse of discretion, particularly in view of the thorough voir dire examination of the panel, which did not reveal any failure to get a jury free of influence. It is noted in appellants' statement of appeal that counsel emphasized the complete unawareness of anything about the case on the part of the panel.

3. It is contended the statutes upon which the prosecution was based were unconstitutional both per se and as applied. The statutes are said to be vague to the extent that a citizen having a constitutional right to free speech wouldn't be able to know how to exercise that liberty so as to stay clear of offending K.R.S. 531.010, 531.020 and 531.080.

Section 531.010 and 531.020 are also attacked for vagueness in that they do not define "sexual conduct" and "geographical community standard". It is further asserted they outlaw the depiction of sexual conduct, thus depriving the jury of its function to determine whether such depiction is or is not offensive under the obscenity laws.

In addition to vagueness, these statutes are denounced as unconstitutional because they impose greater restrictions on an individual than the conduct that is permissible under Federal Court rulings.

Statutes are not necessarily unconstitutional or even unusual because the meaning has to be judicially construed with reference to whether particular conduct of a defendant constitutes a violation of the statutory terms. The subject matter of a statute is generally a controlling factor as to how specific it can be. Some subjects lend themselves to setting out in minute detail what conduct constitutes a violation, while others deal with subject matters that are complex in nature and by necessity are less precise. Such statutes frequently have to be judicially construed as to their scope and extent with reference to certain conduct, using the judicially accepted rules of construction of statutes. The statutes in question pertain to subjects of broad scope and are couched in language of general use and are sufficiently specific to reasonably inform the public of the nature of the activity that is prohibited.

The terms "sexual conduct" and "geographical community standard" are capable of judicial construction. The subject is one in which the state has the right to regulate under its police powers. It is considered these statutes are not unconstitutional.

4. The appellants contend error of the court in refusing to admit into evidence certain offered magazines, the

content of which is considered comparable to the material in question. The court did accept some of the magazines while it rejected others. Appellants claim the acceptance of some and the rejection of others was on the basis of popularity of the publication which, of course, is not a proper basis for such decision. It is not apparent that it was popularity of the magazines that influenced the decision. Greater circulation is more indicative of acceptance of the contents as a community standard. The offer of magazines other than the ones subject of this litigation for the purpose of comparison of the contents is effective to establish what is and what is not the community standard. It is not apparent that the trial court abused its discretion in this respect. There is no showing that the rejected material is accepted in the community.

5. The phrase "purient interest" is not defined in the obscenity statutes. The definition given by the court is asserted by the appellants as erroneous. Appellants' cited definitions by courts of other jurisdictions. Any definition of this term must not be so broad as to interfere with or make illegal any rights guaranteed by the First Amendment to the Constitution. A careful consideration of the definition given in the court's Instruction 3 is not inconsistent with the constitutional right and is in keeping with the police power to regulate, even though it is not verbatim with appellants' offered one. It does not attempt to limit what can be said or written, rather, it limits only the purposes of such statements as they relate to obscenity. This is found not be error.

6. Appellants claim error in that the Court declined to instruct the jury that it could not determine obscenity on the basis of what the jurors as individuals believed to be obscene. Appellants are correct in that the jurors may

not use this criteria. The instructions given by the court nevertheless did effectively instruct the jury that it must use community standard. Having thus told the jury what it must do, it becomes unnecessary and redundant to inform the jury what it may not do. The Court did not err in declining to give this instruction.

7. Appellants desired an instruction to the jury that it could not use bias, prejudice, sympathy or public opinion as a means of determining what is obscene. No harm can be seen in having so instructed the jury, but the failure to so instruct the jury is not viewed as erroneous because the instructions as given told the jury that it must use community standard as fact, in order to consider the defendants in violation, and this eliminated public opinion. There is no indication that the jury injected bias, prejudice, sympathy or public opinion into its verdict. This is further indicated by the voir dire examination in the selection of the jury as to bias or prejudice.

8. Appellants contend it was error in that the court did not instruct the jury that defendants Lewallen and/or Cooper had to be in *possession* of obscene matter. K.R.S. 531.020 (1) (c) (5) declares *distribution* of obscene matter an offense and Section (7) makes *possession* an offense. Either the distribution or possession with the intent to distribute or exhibit is illegal under the statute. The word "distribution" does require some form of possession at least long enough to distribute. The instruction concerning distribution does not also have to include the word possession because obviously it is necessary to possess as a prerequisite to distributing an article. The jury was instructed that the offense can be committed both ways, either by distribution or by possession with intent to distribute it.

9. The appellants argue that the trial court instructed the jury in a manner that assumed as true both intention and guilt on the part of the defendants Lewallen and/or Cooper, and also assumed as true that the material was obscene. It is further claimed the instructions did not put to the jury that to find guilt on the part of Albert Wright, he had to have knowledge that the matter was obscene and the jury was instructed concerning acts which were not a part of the charges against Lewallen and Cooper.

The jury was instructed that knowledge is required but knowledge did not have to come from seeing or reading the material but that it is sufficient if knowledge came from another source. The instructions did not presume guilt, but set out a prerequisite to the jury's finding of guilt that the jury must believe certain things beyond a reasonable doubt. In addition, the court instructed the jury that the defendants were presumed innocent.

10. Appellants moved the court to define "community", and object to the court's finding that the community consisted of Campbell County from which the community standard must be drawn. There is no precise definition of the word "community" either in the statute or by decision of Kentucky courts. One law dictionery defines community as a neighborhood, vicinity, synonymous with locality. Also, community is referred to as a body politic.

In the present case, the qualifications of jurors are that they live in Campbell County, the venue of the case is in Campbell County, and it seems to be consistent with legal definitions of community as a body politic that the community is Campbell County. In the absence of Kentucky decisions to the contrary, it cannot be said that the trial court was in error in defining the community as being county-wide.

11. Appellants contend that the jury was not properly informed or instructed that it must consider the questioned publications as a whole. The court's instruction No. 4 goes into detail to inform the jury that such publications must be considered as a whole rather than mere exerpts from the publications. There is no indication that the jury failed to observe this instruction.

12. Appellants offered an instruction that if there was doubt concerning a higher degree of an offense, that the jury must find on a lower degree of the offense. The court did not so instruct the jury and the appellants claim this as error. Although such instruction is mandated by the citations offered by the appellants, it is deemed not an applicable instruction in this case. K.R.S. 531.020 provides that possession with intention to distribute or display or distribution of a single unit constitutes a Class B misdemeanor while more than one unit constitutes a Class A misdemeanor. This distinction in the statute between what is a Class A and what is a Class B misdemeanor is not dependant at all on the manner of commission of the offense, but is solely a question as to how many units were involved. It would be improper and prejudicial to the defendants in this case for the court to instruct the jury that if it was in doubt about the possession or distribution of two or more units of offending material that it should find the defendants guilty on the basis that only one unit was involved. It is concluded the court did not err in failing to give the lesser degree instruction in this case.

13. Defendants assign as error the failure of the trial court to inform the jury that to be guilty of the offenses charged, the defendants had to have *personal* knowledge of the contents of the material in question. They cite

Hamling vs. U.S., 418 US 87. It is the position of appellants that in the absence of *personal* knowledge, scienter is lacking. Scienter is generally referred to as "guilty" knowledge. K.R.S. 531.020 states a person is guilty when "having knowledge of the content and character of the material. The statute does not require that the accused either has seen or read the material. If reading or seeing the material be required, it would be possible for an offender with knowledge from any other source to violate the statute with impunity so long as he were sure to not look at it prior to its distribution.

14. Another question raised on appeal is the court's failure to inform the jury whether the depicted act was a legal or illegal act, the latter being patently offensive, while the depiction of the legal act may or may not be offensive at all depending upon other criteria. The statute does not distinguish between acts which are legal or illegal or which are patently offensive. The instructions herein encompass the depiction of both legal and illegal acts if it is clearly offensive according to community standards. This is considered an ample instruction without reference to whether the act depicted was a legal or illegal one.

15. Appellants assign as error the refusal to instruct that depiction of nudity, genitalia and simulated sexual conduct, standing alone, is not a violation of a statute. The instructions given specify in detail what acts are in violation of the statute and inform the jury what criteria it must use to arrive at a conclusion about it. Depictions of nudity, genitalia and simulated sexual conduct, standing alone, could not support a finding of guilt if the jury followed the instruction as given, because these factors, standing alone, are already eliminated from the jury's consideration. Further instructions informing the jury what it may not do in finding a verdict is not required.

16. Appellants offered an instruction which would have required the jury to find scienter in the facilitation charges. K.R.S. 506.080 does require scienter in that it makes facilitation an offense only when one who assists another in violating the act does so knowing that the first person is committing or trying to commit the offense. If the aider doesn't know the material is obscene, he isn't committing an offense. The jury was amply informed on this subject, however. The court informed the jury that an aider had to have such knowledge but that it may be proved that the aider had the knowledge by either direct or circumstantial evidence or both. It is concluded that such scienter requirement is met.

17. Offered by the appellants but declined by the court were nine instructions taken from Federal Jury Instructions, the substance of which constituted what had been judicially decided in various jurisdictions to be the law on the subject of obscenity prosecution. The refusal to give such instructions is listed by the appellants as reversible error. It is not necessary that the trial court give offered instructions so long as the court serves the basic functions by instructing the jury what it must believe from the evidence in order to resolve each dispositive factual issue in favor of the party who bears the burden of proof on that issue. In this case, the instructions did that without using the instructions offered by the appellants. It is concluded that the instructions as given meet the necessary above stated basic functions of court, as stated in Palmore's Instructions and as decided by Kentucky's highest court.

18. In a Bill of Particulars, the Commonwealth stated that it relied on the depicted "acts of sexual intercourse" and "physical contact with the genitals", but in the instruc-

tions the court added several other types of acts which the Commonwealth did not specifically mention in its Bill of Particulars. Some of the matter included in the instruction was omitted in the Bill of Particulars because the County Attorney considered all such specific acts to be a part of the general term "sexual intercourse" or "physical contact with the genitals". Appellants assert that this was a variance and consequent error because it allowed the jury to find guilt concerning acts which were not specifically mentioned in the Bill of Particulars as being relied on by the Commonwealth. There is no indication in the jury's verdict what specific acts depicted in the books the jury considered obscene. The purpose of a Bill of Particulars being to inform the defendants as specifically as possible the charges against them so as to prepare an adequate defense, and the publications being available to appellants, there is no showing that the appellants were misled in the generalization by the County Attorney in its Bill of Particulars that would lull the appellants into inadequate preparation of defense.

19. The officer who apprehended the defendants testified he was on the premises to investigate a possible gambling situation, and the defendants offered an instruction that the jury could find guilt only on the charges made and for nothing else. Such instruction would have further eliminated any possibility that the jurors would consider gambling as a factor in arriving at a verdict. Although no harm could be seen in giving this instruction, likewise no harm can been seen in failing to give it because the instructions informed the jury the factual issues involved without any reference to gambling. The jury was instructed only on the issues of obscenity.

20. Appellants contend it was error for the court to

refuse to dismiss two of the three magazines involved in the controversy because those two magazines did not show ultimate sex acts or violence toward women. They were described as "soft core" rather than "hard core" pornography. Had the court dismissed these magazines, it would have found as fact that the two magazines were not in violation of K.R.S. 531.010 (2). If there is any question at all whether said two magazines contained matter that could predominently appeal to purient interest in sexual conduct as measured by contemporary community standards, it is for the jury to decide. The issue is not solely a question whether the magazines depict the ultimate sex act or violence toward women; rather, it is a factual question whether or not they contain material that is obscene under the act.

21. There is no direct testimony about community standards. Appellants claim answers to voir dire questions indicate that the jurors had no knowledge whatsoever about the subject of this controversy and therefore had no personal knowledge of what constitutes community standards, and, therefore, could not properly apply community standards in determining obscenity. Evidence concerning community standards, although sparse, is not totally lacking.

The admission of certain publications not the subject to this controversy, that are circulated in the community and were subject to comparison with the material in question provided some insight into what community standards are.

JUDGMENT

IT IS ORDERED AND ADJUDGED that the Judgment of the District Court be affirmed.

/s/ THOMAS F. SCHNORR
JUDGE

CERTIFICATION

I, Edward J. Blau, Clerk of Campbell County Circuit Court, do hereby certify that I have this date, November 4, 1982, mailed copies to Hon. Edward Blau, Hon. William Schottelkotte, Hon. W. Robert Lotz, Hon. Michael Williams and Hon. Leonard Kopowski, Judge.

EDWARD J. BLAU, CLERK
CAMPBELL CIRCUIT COURT

By /s/ MARGIE SCHMITZ, DC

COMMONWEALTH OF KENTUCKY,
COURT OF APPEALS

NO. 82-CA-2554-I

JAMES E. LEWALLEN, LESLIE COOPER
AND ALBERT WRIGHT,

Movants,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

APPEAL FROM CAMPBELL CIRCUIT COURT
ACTION NOS. 81-X-15, 81-X-16 & 81-X-17

ORDER DENYING DISCRETIONARY REVIEW

Before: McDONALD, DUNN, AND WHITE, Judges.

Movant's motion to file discretionary review out of time is GRANTED. Respondent's motion to dismiss is DENIED.

The court, having reviewed the motion for discretionary review and being otherwise sufficiently advised, ORDERS that it be, and is hereby, DENIED.

ENTERED: January 31, 1981.

/s/ MICHAEL O. McDONALD
JUDGE, COURT OF APPEALS

SUPREME COURT OF KENTUCKY

83-SC-127-D

JAMES E. LEWALLEN, LESLIE COOPER AND ALBERT WRIGHT,

Movants,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON REVIEW FROM COURT OF APPEALS
82-CA-2554-I
CAMPBELL CIRCUIT COURT
(81-X-15, 81-X-16 & 81-X-17)

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of James E. Lewallen, Leslie Cooper and Albert Wright for a review of the decision of the Court of Appeals is denied.

All concur.

ENTERED June 8, 1983.

/s/ ROBERT F. STEPHENS
Chief Justice

COMMONWEALTH OF KENTUCKY
CAMPBELL DISTRICT COURT
FIRST DIVISION
BOOKSTORE NO. ONE

COMMONWEALTH OF KENTUCKY,

Plaintiff,

vs.

ALBERT WRIGHT, MARY WRIGHT,
JAMES LEWALLEN, LESLIE COOPER,

Defendants.

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 29

The law does not compel a Defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a Defendant to testify.

As stated before, the law never imposes upon a Defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Devitt & Blackmar,
Federal Jury Instructions,
§ 17.14

No. 83-189

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES LEWALLEN,
LESLIE COOPER,
ALBERT WRIGHT . . . . . Petitioners

versus

COMMONWEALTH OF KENTUCKY . Respondent

Brief in Opposition to Petition for Writ of Certiorari from the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

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Commonwealth of Kentucky

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WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3391, LOUISVILLE, KY.

QUESTIONS PRESENTED

I. Should Certiorari Be Denied When None of the Considerations Governing Review Are Present Under Rule 17?

II. Should Certiorari Be Denied to Leslie Cooper Because He Testified At Trial?

III. Should the Court Apply *Carter* v. *Kentucky*, 450 U. S. 288 (1981), Retroactively, Where the Error, If Any, in Not Giving the "Adverse Inference" Instruction Was Harmless Error?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-189

JAMES LEWALLEN,
LESLIE COOPER,
ALBERT WRIGHT - - - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

The respondent respectfully prays that the Petition For Writ of Certiorari be denied.

OPINION BELOW

JURISDICTION CONSTITUTIONAL PROVISIONS

Pursuant to Rule 34.2 of the Supreme Court of the United States, the subject areas referred to above have been presented by the petitioners to the satisfaction of the respondent. Furthermore, all parties to the proceedings to the Kentucky Courts are listed in the caption with the exception of Mary Del Wright, who was found not guilty by the Campbell District Court jury.

STATEMENT OF THE CASE

Again, pursuant to Rule 34.2, the respondent wishes to add information omitted in the petitioners' Statement of the Case.

Both police officers who purchased the adult magazines on April 9, 1980 testified that it was obvious upon entry to the bookstore that sexually explicit materials were being sold there.

James Lewallen held the bookstore occupational license on April 9, 1980 and had filed current occupational license tax forms and employer withholding forms on behalf of his business which identified him as either the license holder or owner. James Lewallen was further observed on numerous occasions selling the bookstore materials to customers.

Albert Wright was observed at numerous times sitting behind the sales counter answering the telephone while the business was opened. He was further observed on a number of occasions taking money out of and putting money in the cash register behind the counter. No customers were permitted in the cash drawer. Evidence demonstrated that the employees were more attentive to their duties when Albert Wright was present.

Leslie Cooper admitted he sold the materials found to be obscene and that he was clerking in the store at the direction of James Lewallen.

The sentences imposed by the jury against James Lewallen and Albert Wright were the maximum penalties permitted under the statute for the offense charged.

REASONS FOR DENYING WRIT

I. None of the Considerations Listed in Rule 17 Are Applicable to the Case At Bar.

Although obviously not controlling, Rule 17 of the Rules of this Court indicate the character of the reasons that will be considered in a petition for a Writ of Certiorari. Since the Kentucky Courts have accepted and followed the applicable federal law, the petition should be denied.

II. Leslie Cooper's Testimony Renders *Carter* v. *Kentucky* Inapplicable.

Certiorari should not be granted concerning Leslie Cooper and *Carter* v. *Kentucky* should not be applied to his case because he testified during the trial. Such testimony stands as a waiver of any right to the "adverse inference" instruction.

III. Based On the Evidence At Trial, Which Was So Substantial and Overwhelming, and in Light of the Totality of the Circumstances, the Failure to Give the "Adverse Inference" Instruction Could Not Possibly Have Changed the Result.

In *Kentucky* v. *McIntosh,* 646 S. W. 2d 45 (Ky. App., 1982) decided February 16, 1983 by the Supreme Court of Kentucky, it was held that the failure to give a requested instruction on the effect of the defendant's refusal to testify can be nonprejudicial error if there is overwhelming evidence of guilt and the result would not have been any different when the case is considered

as a whole. In this case, the defendants' conviction was upheld.

The Court observed in that decision that the rule is the same in Mississippi, Nevada and Indiana, other jurisdictions which have considered the same question in light of *Carter* v. *Kentucky,* 450 U. S. 288 (1981).

The Court further observed that in *Carter, supra,* the question was left open as to whether the failure to give an "adverse inference" instruction was nonprejudicial.

In the present case, the evidence was overwhelming against James Lewallen and Albert Wright. James Lewallen was the license holder of the bookstore, the lessee of the building owned by Albert Wright, the day-to-day operator of the business and the person who directly arranged for Leslie Cooper to work on the day he sold the obscene materials to the plain clothed police officers. Albert Wright was the co-owner of the real estate, was observed regularly behind the counter of the bookstore in full view of the materials to be sold, made use of the cash drawer behind the counter, was often seen in James Lewallen's company and had attempted to intervene on behalf of Lewallen concerning a license change for the adult bookstore.

In Kentucky, a defendant such as Albert Wright, as a landlord, may be convicted for criminal acts upon the premises he owns if the landlord performs acts or otherwise encourages or lends assistance to the commission of the acts. *Bradley* v. *Commonwealth,* Ky., 257 S. W. 11 (1925), *Whitt* v. *Commonwealth,* Ky., 298 S. W. 1101 (1927). The landlord is also culpable if the tenant was given the opportunity or means to commit

a crime upon the landlord's property. See *Wagner* v. *Commonwealth*, Ky., 182 S. W. 2d 661 (1964), *Hurd* v. *Commonwealth*, Ky., 78 S. W. 2d 9 (1935).

As a further indication of the overwhelming evidence against the defendants, the jury imposed the maximum sentence. In Kentucky, the jury determines guilt and the sentence based solely on the evidence heard at a single trial; there is no bifurcated hearing.

In a parallel situation, the Court has stated in *Kentucky* v. *Wharton*, 441 U. S. 786 (1979) and *Taylor* v. *Kentucky*, 436 U. S. 478 (1978) that the failure to give an instruction on the presumption of innocence does not in and of itself violate the Constitution. Such a failure must be evaluated in light of the totality of the circumstances including all of the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming and other relevant factors to determine whether the defendant received a fair trial.

In light of the totality of the circumstances, it is obvious that the defendant's failure to receive the "adverse inference" instruction did not effect the decision of the jury. The failure of the defendants to testify was dealt with by defense counsel in voir dire, opening argument and closing argument. In voir dire, the jurors indicated that the failure of the defendant to testify would not affect their consideration.

A further indication that the failure to give the "adverse inference" instruction was nonprejudicial, was that the jury found the fourth defendant, Mary Del Wright, who also did not testify, not guilty. It is

obvious that the jury did not find James Lewallen and/or Albert Wright guilty simply because each failed to testify, or that it was even a consideration.

The Court should not grant certiorari based on the *Mack* v. *Oklahoma,* 103 S. Ct. 201 (1982). That case dealt strictly with the retroactive effect of *Carter, supra,* and not with whether the failure to give the "adverse inference" instruction was nonprejudicial error. Since *Mack, supra,* had been decided at the time the Kentucky Supreme Court denied discretionary review in the present case and assuming that case was considered by the Court in its ruling, it becomes apparent that discretionary review was denied on the grounds that, in light of the totality of the circumstances, the failure to give the instruction was nonprejudicial error.

CONCLUSION

WHEREFORE, Commonwealth of Kentucky respectfully submits that based on the overwhelming evidence of guilt and in light of the totality of the circumstances, the failure to give the "adverse inference" instruction was nonprejudicial, that the Kentucky Court of Appeals and the Kentucky Supreme Court properly denied discretionary review, that there are no special or extraordinary reasons for the United States Supreme Court to grant discretionary review, and that, therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATION

I hereby certify that I have, this 2nd day of September, 1983, mailed two (2) true copies of the foregoing Brief for the Respondent to: Hon. W. Robert Lotz, Jr., Counsel of Record, P.O. Box 1078-213 E. Fourth Street, Covington, Kentucky 41011.

Assistant Attorney General